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No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1968

THOMAS KADLEC, JAMES W. KADLEC, and ISAAC GRINSTEAD,

Petitioners,

vs.

ILLINOIS BELL TELEPHONE COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF

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Respondent (IBT) claims Petitioners' remedy is an action for private trespass or breach of contract and this Petition should be rejected as this case involves "'no important questions of federal law'', conflict with this Court's opinions do not exist nor is there any departure from accepted judicial procedure (p. 4). Thus they argue that the denial of rights arising from the long line of cases illustrated by *Bell* v. *Hood,* 322 US 678, 682, prohibiting the summary disposition of cases presenting constitutional issues have no application here. Equally ir-

relevant IBT urges is the construction of the Federal Rules governing pleadings. *Conley* v. *Gibson*, 355 US 41, 48. In this same immaterial category is the view expressed in *Dt. of Col.* v. *Little*, 178 F2d 13, 17 (1949) (*Affd.* on other grounds, 339 US 1) when the Court said:

> "To say that a man suspected of crime has the right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection is a fantastic absurdity."

In *Camara* 387 US 523 and *See* 387 US 541 this Court assured identical Fourth Amendment protection to both groups. The issue here is whether a state which may not authorize its own employees to violate this Amendment may confer such power upon public utilities asserting the right of entry without prior notice, a hearing or warrant against every resident and business institution in its borders. The time is ripe for the federal courts to consider and resolve this issue for this Court so directed the issue be decided on "a case by case basis". *See* v. *Seattle*, 387 US 541, 546.

Contrary to its claims, IBT by its Motions to Dismiss has conceded that it was enforcing legal rights conferred upon it by the comprehensive provisions of the Illinois Public Utilities Act affecting these and other aspects of its service.

In rejecting Petitioners' claims the Court of Appeals and Respondent both relied upon certain selected allegations in the original as well as Amended Complaint. IBT has also ventured beyond the record (1st par. p. 4 except 1st sentence, fn 2, p. 2, last sentence fn 4.) IBT and the Court of Appeals overlooked par. 22. (IBT App. p. A4,

A5) alleging IBT purported to act under the Illinois Public Utility Laws or its regulations having the force and effect of law (see also par. 19D, p. A7, IBT App.)

As IBT has on the one hand (see last sentence fn 4, p. 5) stated that it acted because it concluded plaintiffs breached the terms of several tariffs including wrongful connection of its equipment with its own facilities and on the other denied that such acts represent conduct under color of law (pp. 4-7) we have supplemented this brief by the April 6, 1967 letter of IBT's general attorney Gordon Winks, setting forth IBT's exact version of what transpired (see Appendix). We do not now consider it necessary to correct its misstatements but beyond question it contradicts IBT's present assertions that the state was not involved in its conduct (pp. 4-7). On the contrary, Winks' letter demonstrates conclusively that Respondent assumed it was empowered by its filed rules, Illinois statutes and acts of the Commission to make ex-parte determinations whether Petitioners as its customers violated Illinois law. It was thus likewise authorized to perform acts raising serious questions under Amendments I, IV and XIV.

The Public Utilities Act "is a part of the charter of every public utility company" in Illinois. *Streator Aqueduct Co.* v. *Smith,* 295 FED 385, 393. Since the comprehensive provisions of the Public Utility Act supersede the common law (*Terminal RR Asso.* v. *PUC,* 304 Ill. 312, 317, 136 NE 797 (1922)) every step of its service to the public including the aspects involved here arise directly out of authority conferred upon it by the statute or the Commission acting or failing to act thereunder.

The generally accepted principle applicable to the entry upon customer's premises and discontinuance of service was stated in *Carroway* v. *Carolina P&Lt. Co.*, 84 S.E.2d 728, 731 (So. Car. Sup. Ct.)

> "The foregoing rules and regulations have the force and effect of law and were binding on the plaintiff regardless of whether or not he agreed to them. . . ."

Contrary to IBT's claim its tariffs may go into effect without formal Commission action it is thus wholly immaterial whether the Commission acted formally or informally. Section 32 of the Illinois Public Utilities Act (p. 4A Pt. App.) provides:

> "All rules and regulations made by a public utility affecting or pertaining to charges of service to the public shall be just and reasonable."

True the preponderance if not 90% of Bell's system regulations filed with state Commissions may become effective without public hearings but in both cases they have the force and effect of law. Thus IBT's reliance upon its recent Illinois cases involving *Sareles* and *Miner* (p. 7) disregards their true significance for they hold IBT's legal duty "is determined by the particular provisions of the tariff on file with the Commission". (*Sareles*, 192 NE 2d 451, 453)

This Court may take judicial notice that IBT's basic contentions parallel the historic position of the Bell system with regard to its own remedies as compared to those of its customers. It possesses non-administrative remedies. (*IBT* v. *Miner*, 136 NE2d 1) It is strange that it now argues that Petitioners possessed a remedy for trespass when Bell System companies have successfully opposed such remedies arising out of entry upon customer's premises though under somewhat different circumstances.

Peace v. *Sou. Bell T&T Co.*, CA4 (1953); 208 F2 901, 902; *Plate* v. *Sou. Bell T&T Co.*, 98 FS 355, US Dt. Ct. D.S.C. (1951).

Here they originally argued by their two Motions to Dismiss that Petitioners' remedies were solely before the Illinois Commission (Opinions of Judge Marovitz pp. 9-19 Pet. App.).

The fictional character of administrative remedies to the preponderance of Bell system and other utility customers under state law (see Hearings Before Subcommittee On Intergovernmental Relations of the Committee on Government Operations, U.S. Senate, 91st Congress, First Session S. 607), Utility Consumers Counsel Act of 1969. Pages 91 ff, 361 ff, 567 ff, 649 ff, 1309-1310, 1350 ff.

The cases relied upon by IBT (pp. 6 & 7) are wholly inapplicable here. Four of them beginning with *Reinke*, 279 FS 155 involve actions by state prisoners or suits by university students. The *Elders* case, 289 F. Supp 630, 634, arose out of an action by discharged employees of a common carrier against its employer. The critical facts here are that IBT entered the premises of the plaintiffs for the purpose of enforcing its alleged legal rights against the Petitioners. As the defendants imply (fn 4, last sentence) it ex-parte concluded its Petitioners had violated several tariffs including using non Bell (Western Elec.) equipment. The implications of these regulations to the anti-trust laws was first noted in *Hush-A-Phone* v. *US*, 238 F2d 266, 268, 269 CA of C. Finally the FCC itself modified regulations such as par. 5. (IBT App. p. A8, A9). (See *In re Carterfone Device in Message Toll Service*, Nos. 16942, 17073, 13 FCC 2d, 420-441) (1968).

CONCLUSION

This case fully meets the test of the following controlling decisions: *Bell* v. *Hood,* 327 U.S. 678, 682; *Newburyport Water Co.* v. *Newburyport,* 193 U.S. 561, 579; *Evans* v. *Newton,* 382 U.S. 296, 300; *See* v. *Seattle,* 18 L. Ed. 943 (1967).

It should, therefore, grant this Petition.

Respectfully submitted,

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